

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NAPLETON 1050, INC. d/b/a NAPLETON CADILLAC
OF LIBERTYVILLE

and

Cases 13-CA-209951
13-CA-220180
13-CA-222994

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AUTOMOBILE
MECHANICS LOCAL 701, AFL-CIO

Emily O'Neill and Catherine Schlabowske, Esqs.,
for the General Counsel.

Michael P. MacHarg and Tae Y. Kim, Esqs.,
for the Respondent.

Brandon M. Anderson, Esq.,
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville (Respondent) violated the National Labor Relations Act (the Act) by, in November 2017, refusing to execute an initial collective-bargaining agreement that it negotiated with the International Association of Machinists and Aerospace Workers, Automobile Mechanics Local 701, AFL-CIO (the Union). The General Counsel also asserts that in March 2018, Respondent unlawfully failed to reinstate bargaining unit members who had been engaging in an unfair labor practice strike, but then made an unconditional offer to return to work. As explained below, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to execute the collective-bargaining agreement, and violated Section 8(a)(3) and (1) of the Act by not reinstating and/or recalling striking employees after their March 22, 2018 unconditional offer to return to work.

STATEMENT OF THE CASE

This case was tried in Chicago, Illinois, on April 10-11, 2019. The Union filed the charges at issue here on the following dates:

<i>Case</i>	<i>Charge Filing Date</i>
-------------	---------------------------

5	<table border="0"> <tr> <td>13-CA-209951</td> <td>November 15, 2017</td> </tr> <tr> <td>13-CA-220180</td> <td>May 14, 2018</td> </tr> <tr> <td>13-CA-222994</td> <td>June 29, 2018</td> </tr> </table>	13-CA-209951	November 15, 2017	13-CA-220180	May 14, 2018	13-CA-222994	June 29, 2018
13-CA-209951	November 15, 2017						
13-CA-220180	May 14, 2018						
13-CA-222994	June 29, 2018						

On October 31, 2018, the General Counsel issued a consolidated complaint covering all three cases listed above. The General Counsel subsequently amended the consolidated complaint on March 19 and 21, 2019.

In the consolidated complaint (as amended), the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by: since about November 15, 2017, failing and refusing to execute in writing a complete agreement that reflected the September 29, 2017 agreement that the parties reached on the terms and conditions of employment for an initial collective-bargaining agreement. The General Counsel also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by: since about March 26, 2018, failing and refusing to reinstate (or offer to reinstate) nine employees who made unconditional offers to return to work after engaging in a strike that was prolonged by unfair labor practices (specifically, Respondent's refusal to execute the written agreement noted above). Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

Respondent, a corporation with an office and place of business in Libertyville, Illinois, engages in the business of selling and servicing new and pre-owned automobiles. In calendar year 2017, Respondent derived gross revenues in excess of \$500,000, and purchased and received goods and materials at its Libertyville, Illinois facility that were valued in excess of \$5,000 and came directly from points outside the State of Illinois. Respondent admits, and I find based on the evidentiary record, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent also admits, and I find based on the evidentiary record, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

“On June 20, 2016, the Napleton Auto Group purchased the assets of Weil Cadillac, a car dealership, and began operating the dealership as Napleton Cadillac of Libertyville [Respondent]. In early August 2016, [Respondent’s] service technicians initiated an organizing campaign with [the Union]. . . . On October 18, 2016, the Union won a Board-conducted representation election.” *Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville (Napleton I)*, 367 NLRB No. 6, slip op. at 1 (2018); see also Tr. 19, 100, 108–110, 194.

Since October 18, 2016, the Union has been the exclusive collective-bargaining representative of employees in the following appropriate unit:

Included: All full-time and regular part-time Service Technicians and Body Shop Technicians including journeymen, apprentices, semi-skilled and lube rack technicians who are employed at [Respondent’s] facility currently located at Napleton Cadillac of Libertyville, 1050 S. Milwaukee Avenue, Libertyville, IL.

Excluded: All other employees including parts department employees, service writers, porters, sales employees, managerial employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(GC Exh. 1(i) (par. VI) (noting that on October 31, 2016, the Union was certified as the exclusive collective-bargaining representative of the bargaining unit); Tr. 20.)

B. August 1, 2017 – The Bargaining Unit Goes on Strike

In or about late October 2016, Respondent and the Union began negotiating over the terms of an initial collective-bargaining agreement. By late July 2017, however, negotiations stalled. To gain some leverage for the Union in contract negotiations, nine employees in the bargaining unit decided to go on an economic strike, starting on August 1, 2017.² *Napleton I*, 367 NLRB No. 6, slip op. at 2; see also Tr. 21–24, 45–46, 110–112, 133–138, 142–143. The nine strikers were: Chris Becharas; Goran Bogojevic; John Drucker; Mir Iqbal; Grant Kelley; Jeffrey McEntee; William Oberg; Mike Schiro; and Joseph Schubkegel. (Tr. 177–178 (referencing the nine strikers listed in the complaint, GC Exh. 1(g) (par. 5).)

On the first day of the strike, Respondent distributed a letter to the employees who were on strike. The letter stated, in pertinent part:

² By design, the strike at Respondent’s facility coincided with a “citywide strike against 129 Chicago-area car dealerships belonging to the New Car Dealer Committee (NCDC), a multiemployer bargaining association.” *Napleton I*, 367 NLRB No. 6, slip op. at 2. Respondent was not a part of the NCDC and its negotiations with the Union for a standard automotive agreement covering 129 dealerships. Instead, Respondent was negotiating with the Union for a standalone collective-bargaining agreement. (Id.; Tr. 20–21, 23, 139, 158–159, 209, 211–212.)

We have placed ads for replacement technicians. If and when you are replaced, you will be notified.³ After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur.

5 *Napleton I*, 367 NLRB No. 6, slip op. at 2.⁴

C. August 3, 2017 – The Toolbox Incident

10 On or about August 1 or 2, 2017, Respondent, through its attorney and chief negotiator James Hendricks, informed the Union that striking employees would need to remove their toolboxes from the facility. Since the toolboxes are quite large (up to 15 feet long, 6–7 feet high, and potentially weighing thousands of pounds), the Union and Respondent agreed that employees could have until the end of August 4 to remove their toolboxes. *Napleton I*, 367 NLRB No. 6, slip op. at 2 & fn. 7; see also Tr. 93–94, 211.

15 Notwithstanding the prior agreement about when employees needed to remove their toolboxes, on August 3, 2017, Hendricks advised the Union that employees needed to remove their toolboxes immediately. That same morning, Respondent rolled employee toolboxes off its property and onto a service access driveway, where two of the toolboxes (belonging to striking employees Joseph Schubkegel and William Oberg) sustained rain damage.⁵ *Napleton I*, 367 NLRB No. 6, slip op. at 2–3; Tr. 29, 46, 150.

D. September 29, 2017 – The Parties Return to the Bargaining Table

25 On September 29, the Union and Respondent returned to the bargaining table.⁶ Initially, Respondent (through Hendricks) asked about resolving various pending unfair labor practice

³ James Hendricks, Respondent’s attorney and chief negotiator in the relevant time period, testified that Respondent subsequently sent letters to striking employees to notify them that they were permanently replaced. (See Tr. 215, 232–233.) Hendricks did not offer any specific information about the timing or content of any such letters, and the parties did not enter any permanent replacement letters into the evidentiary record. Since this evidentiary “gap” is not material to my analysis, I take no position on the credibility or weight of Hendricks’ testimony on this issue.

⁴ The Board held that Respondent did not make an unlawful implied threat of job loss by informing employees in the August 1 letter that they would be placed on a preferential hire list if Respondent hired replacement workers. *Napleton I*, 367 NLRB No. 6, slip op. at 3.

⁵ The Board held that Respondent violated Section 8(a)(1) of the Act by ordering its employees to remove their toolboxes and subsequently removing employees’ toolboxes from the dealership because they engaged in protected strike activity. *Napleton I*, 367 NLRB No. 6, slip op. at 3; Tr. 29, 46, 150. However, in the consolidated complaint in this case, the General Counsel did not allege that the strike was converted to an unfair labor practice strike based on the August 3 toolbox incident. (See GC Exh. 1(e) (pars. 5, 7); see also GC Posttrial Br. at 9 fn. 4, 15 fn. 9, 21–25 (noting that the Region disagreed with the Union’s theory that the strike converted to an unfair labor practice strike on August 3, 2017, and arguing that the strike converted to an unfair labor practice strike on November 15, 2017).) Accordingly, I have not considered the merits of any arguments that the strike converted to an unfair labor practice strike based on the toolbox incident.

⁶ The renewed interest in bargaining arose in part because the citywide strike involving 129 car dealerships ended on or about September 18, 2017, and the NCDC worked out a standard automotive agreement that covered the bargaining units in those dealerships. The Union and Respondent used some

charges. The Union (through directing business representative Sam Cicinelli), however, asserted that it was focused on negotiating the terms of a collective-bargaining agreement, and was not at liberty to negotiate about the unfair labor practice charges. Accordingly, the parties focused their attention on hammering out the terms of a collective-bargaining agreement. (Tr. 18, 25-30, 144.)

Regarding the collective-bargaining agreement, the parties identified the following items that were still in dispute: (a) the steps that would be required before an employee could be terminated for disciplinary reasons; (b) the pension/retirement plan; (c) health insurance deductibles and copays; (d) whether employee layoffs would be made based on productivity or seniority; (e) wage rates; (f) a union security provision; and (g) the length of the agreement. The Union and Respondent bargained to agreement on each of those issues, with the parties agreeing to: a three-step process before disciplinary terminations; a 401(k) defined contribution plan instead of a pension plan (with Respondent contributing \$70/week per employee); a healthcare plan with a \$10/week copay; layoffs to be made based on seniority; a one-dollar per hour wage increase; a union security provision; and a five-year term for the collective-bargaining agreement. (Tr. 27, 30-34, 73-75, 145-147, 214, 229, 240.)

Although the parties agreed on all issues concerning the collective-bargaining agreement, some “housekeeping” remained to put together a final written agreement. Specifically, the Union needed to prepare a wage scale that reflected the parties’ agreement and would format properly into the document, and needed to obtain contract language from its attorney about holding Respondent’s contributions to the 401(k) plan in escrow for a 6-month waiting period. The Union promised to make those changes and send a final written agreement to Respondent for review. Respondent agreed, noting that the contract language for the 401(k) plan would not hold up finalizing an agreement. (Tr. 34-35, 75-76, 147, 164, 167.)

At the end of the meeting, Hendricks again asked the Union what the parties should do about the pending unfair labor practice charges. Cicinelli responded that he did not have all of the details about the charges, and noted that in any event, the Union was not going to “buy” a collective-bargaining agreement by waiving backpay or other relief that might be owed based on unfair labor practices. Cicinelli added that the parties already had an agreement about the terms of a collective-bargaining agreement, and asserted that any unfair labor practice charges would simply run their course. (Tr. 35-36, 150-151.)

Next, Hendricks asked about the “800-pound gorilla in the room,” meaning the status of the replacement workers and the employees on strike. Cicinelli responded that the Union’s position was that the striking employees would return to work, and asserted that if Respondent thought otherwise, the Union would take its chances with filing and litigating an unfair labor practice charge with the Board because not getting all strikers back to work would be a deal breaker (as to the parties’ chances of working out a strike settlement agreement). Cicinelli then reiterated that he would send a final written collective-bargaining agreement to Hendricks for

of the language in the standard automotive agreement in their negotiations and incorporated similar language into the collective-bargaining agreement. (Tr. 26, 144-145, 236; see also Tr. 58-62, 159-160 (noting that the parties involved in the NCDC dispute negotiated the following separate agreements: a contract; a strike settlement agreement; and a return to work agreement).)

review. Hendricks said “great, sounds good,” and then the parties shook hands and ended the meeting. (Tr. 36–37, 72, 78–79, 147–149, 164, 216–217; see also Tr. 39, 160 (noting that the parties never agreed to condition executing the collective-bargaining agreement on resolving the striking employees’ return to work and/or on resolving the pending unfair labor practice charges); Tr. 213 (noting that Hendricks had final authority to approve the collective-bargaining agreement on Respondent’s behalf, though he kept Respondent’s owner informed of what he was negotiating); GC Exh. 9 (p. 3) (Respondent’s position statement, stating that “[t]he parties reached agreement on all provisions of the collective bargaining agreement, but not on the strikers and/or replacements”).)

*E. November 2017 – Further Communications about
the Terms of the Collective-Bargaining Agreement and the Strike*

On November 1, 2017, Cicinelli emailed Hendricks a written collective-bargaining agreement that reflected the agreement that the parties negotiated on September 29 and specified that the contract would be in effect from September 29, 2017 to July 31, 2022. (GC Exhs. 2(a) (p. 8); 2(b); Tr. 39–40, 152, 230–231, 235–236.) The following email exchange ensued on November 1:

Hendricks: I will try to get to this on Friday. What about the “deal breaker”⁷ and ULP’s?

Cicinelli: We obviously need to talk more about the return to work and strike issues (assuming that’s what you mean by “dealbreaker”) and we’re obviously open to discussing the resolution of the ULPs but need to know whether we’re at least in agreement on the contract terms as reached on the 29th. If we still need to meet to negotiate over the agreement terms, then let’s get them addressed and keep this process moving.

(GC Exh. 2(a) (p. 7); see also Tr. 80–81, 84.)

On November 7 and 8, Cicinelli emailed and telephoned Hendricks to confirm that the written agreement included all of the changes that the parties agreed to on September 29. The following email exchange addressed that question:

Hendricks: [November 10] Sorry for the delay, [S]am. The [CBA] draft looks good, except [Respondent’s owner] will not agree to any pension plan. Probably ought to have a chat on when and how many return to work.

⁷ Both Hendricks and Cicinelli testified that the term “dealbreaker” referred to their disagreement about resolving the strike, and specifically whether: (a) the striking employees would return to their jobs and displace any replacement workers (the Union’s position); or (b) the replacement workers would keep their jobs and the striking employees would be placed on a preferential re-hiring list (Respondent’s position). Where Hendricks and Cicinelli differ is on whether the parties could fully negotiate and be required to execute a collective-bargaining agreement without also resolving the status of the striking employees (Hendricks says “no”; Cicinelli says “yes”). (Tr. 78–79, 98–99, 164, 216–218.) That issue is presented to me to decide in this case.

Cicinelli: [November 10] There is no pension plan in the draft. There's a 401(k) plan (Article 12) with a \$70/week employer contribution instead[.]

5 Cicinelli: [November 13] With that being said, are you good with the draft agreement?

Hendricks: [November 13] Good to go on Napleton, Sam.

10 (GC Exh. 2(a) (pp. 3–7); Tr. 213, 218–219, 231 (Hendricks testimony that the written collective-bargaining agreement reflected all language that the parties agreed to, and that he had the authority to approve the contract); see also Tr. 40–41, 82, 84–85; GC Exh. 9 (p. 3) (Respondent's January 9, 2018, position statement, stating that “[t]he parties reached agreement on all provisions of the collective bargaining agreement, but not on the strikers and/or replacements”).)

15 *F. November 13–15, 2017 – The Parties' Actions after Agreeing on the Terms of the Collective-Bargaining Agreement*

20 Within an hour of notifying the Union that everything was “good to go” with the collective-bargaining agreement, Respondent (on November 13) withdrew its unfair labor practice charge in Case 13–CB–2016658, in which Respondent had alleged that the Union had failed and refused to bargain in good faith. (GC Exhs. 3(a)–(b), 10; see also GC Exh. 2(a) (p. 1) (noting that Respondent withdrew its unfair labor practices charge against the Union); Tr. 47–49, 51–52.)

25 In the morning on November 14, the bargaining unit voted to ratify the collective-bargaining agreement. The bargaining unit then took down the strike line (i.e., ended strike activities) and the Union transported all strike signs to the union hall for storage.⁸ (Tr. 24–25, 42, 52, 80, 112–114, 130–131, 143, 153–156.)

30 In the early evening on November 14, Cicinelli emailed Hendricks to state as follows concerning the strike and the collective-bargaining agreement:

35 The members at Napleton Cadillac of Libertyville voted today to ratify the contract that was reached between the parties on September 29th. As a result, the strike has had the desired effect, the strike is now concluded, and each of the striking employees is making an unconditional offer to return to work. While the strike started as an economic strike, it was immediately converted to [an] Unfair Labor Practice strike when [Respondent] issued permanent replacement letters that illegally threatened those participating in the strike with loss of employment and when [Respondent] unlawfully removed the
40 employees' tool boxes from the work area (and damaging them in the process). These actions prolonged what otherwise would have been a short strike. As a result, [Respondent] is obligated to return all of the employees who participated in the strike and displace the “replacement workers.” The employees are ready and willing to return to

⁸ During the strike, individual bargaining unit members would take the strike materials home for the night and bring the materials back the next morning. (Tr. 114–115, 154.)

work immediately. Please let me know when is an agreeable time tomorrow for the guys to return their tool boxes and what time they should report to work on Thursday.

(GC Exh. 2(a) (p. 3); see also Tr. 42, 45–46.)

5

On November 15, Hendricks emailed Cicinelli to dispute whether the parties had an agreement and whether the strike was an unfair labor practice strike. Hendricks stated as follows:

10

It appears that you have a serious misunderstanding regarding the situation involving a potential CBA [with Respondent]. Simply stated, based on your email, there is no agreement. . . . I will not be manipulated and abused by your less than ethical tactics. We have dealt with one another for a long time, and up until now, I always took your word to have value.

15

Any CBA had a resolution on the striker issue as inextricably intertwined into the fabric of the agreement. I sent you numerous messages to that effect.⁹ Now, you attempt to ramrod an agreement down our throats — and claim some unique theory of striker rights in an effort to end run your bargaining obligation. Unfortunately, you are simply mistaken. If you wanted to let the unfair labor practices run their course, you should have just said so — obviously my client is not in the business of negotiating against itself. It is beyond credulity that we would compromise on all of the issues leading to a CBA — and let you simply have your way on the remaining issues. We withdrew our ULP against the union on the strength of your word. I will reinstate that later.

20

25

Simply put, the understanding on the CBA was that your strikers go on a preferential re-hire list. Period. There is no more to it than that. [Respondent] was not — and is not — part of the CATA NCDC and candidly, no strike should have been effectuated here in the first place. Nonetheless, the employees took action that is within their lawful providence. The employer responded within its lawful rights and permanently replaced the strikers. You, of all people, should know this happens.

30

35

This was AT ALL TIMES an economic strike. Any thought to the contrary is absurd. As a consequence, there is no CBA and you can take whatever steps you believe are necessary to represent your unit members. At this time, the offers to return to work are rejected, as they are not unconditional.

(GC Exh. 2(a) (p. 1).)

40

Citing Respondent's refusal to execute the collective-bargaining agreement, on or about November 20, bargaining unit members resumed their strike at Respondent's facility. Bargaining unit members also began carrying signs stating "Unfair Labor Practice Strike" while on the strike line, and posted similar signs in the area of the strike line. (Tr. 52–54, 115–120, 125, 136, 155–156; GC Exh. 7; see also Tr. 125–126, 139–140 (noting that between August 3

⁹ The evidentiary record does not include any messages between the parties on this issue (beyond what is described in these Findings of Fact). (Tr. 222–223.)

and November 14, 2017, bargaining unit members handwrote “ULP” in the corner of the signs they carried while on the strike line).)

G. February 2018 – The Acting Regional Director Dismisses the Union’s Unfair Labor Practices Charge against Respondent in Case 13–CA–209951

On November 15, 2017, the Union filed an unfair labor practices charge against Respondent in Case 13–CA–209951. In that charge, the Union asserted that Respondent violated the Act by refusing to reinstate striking employees after an unconditional offer to work, and by failing and refusing to bargain in good faith with the Union. (GC Exh. 1(a).)

On February 23, 2018, the Acting Regional Director notified the parties of her decision to dismiss the Union’s unfair labor practices charge in Case 13–CA–209951. The Acting Regional Director stated as follows to explain the decision:

Decision to Dismiss: You have alleged that [Respondent] refused to reinstate employees after an unconditional offer to return to work in violation of Section 8(a)(1) & (3) of the Act. However, the evidence is insufficient to show that [Respondent] had an obligation to reinstate employees at that time because the employees had been permanently replaced during the course of an economic strike. You have also alleged that [Respondent] has failed to execute a collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act. However, the evidence is insufficient to show that the parties had come to a meeting of the minds on all issues during negotiations. Therefore, [Respondent] did not unlawfully fail to execute a contract.

(R. Exh. 1.) On March 9, 2018, the Union appealed the Acting Regional Director’s decision to dismiss the charge in Case 13–CA–209951. (See R. Exh. 2.)

H. March 2018 – Bargaining Unit Members Make Another Offer to Return to Work

At 2:26 pm on March 22, 2018, Cicinelli emailed Hendricks to advise (among other things) that the striking employees were making an unconditional offer to return to work. Cicinelli stated as follows:

While the Union is anticipating both a favorable decision on behalf of the Union with regards to the Libertyville Cadillac hearing as well as our appeal of the dismissal of the last charge filed in this case, I’d nonetheless like to formally request a meeting at your earliest convenience to discuss the return to work of the strikers. We have now been in agreement on the contract terms for several months. Since we do have a contract, each of the striking employees is renewing their unconditional offer to return to work and based on this understanding the Union is making preparations to take the strike line down. Settling the ULP(s) is really no longer an issue (although the Union remains willing to settle these [matters], but there’s no need to hold up the resolution of the contract/strike on this issue). So that leaves only the return to work of the strikers. I am still willing to resolve this issue along the terms we discussed. But if we can’t get that done and agree on the other details relating to a return to work now, let’s get a date on the books in order to keep this moving. Let me know your availability.

(GC Exh. 4 (p. 1); see also Tr. 54–56, 85, 143, 156.) Hendricks (and Respondent’s other attorney, Michael MacHarg, who was copied) received Cicinelli’s March 22, 2018 email on the date and time that it was sent — no evidence was presented at trial to suggest otherwise.¹⁰

On March 26, 2018, Hendricks responded to Cicinelli’s March 22, 2018 email by stating as follows:

Of course, you know we are always ready and willing to negotiate. The outcome of the trial is immaterial, it involves backpay for some individuals and a possible fraud investigation against one individual who is clearly attempting to swindle [Respondent]. You state “we do have a contract.” Please re-read the [Board’s] dismissal of your ULP wherein the Board explicitly found no “meeting of the minds.” I do not know why you think we do not have to come to some actual agreement on the strikers, because that is central to a complete agreement.

The return to work of the strikers remains simple: they are on a preferential re-hire list. I believe their automatic right to reinstatement is gone at the one year anniversary, but I will have to double check that. Nonetheless, they will remain on a re-hire list for the time being. [Beyond] that, we have every intention of honoring the terms that have been previously agreed.

(GC Exh. 4 (p. 2); see also Tr. 55, 85.)

I. April/May 2018 – Additional Negotiations between the Parties

On or about April 4, 2018, the Union took down the strike line. (Tr. 24, 57, 112, 120, 156–157.) The parties then met for bargaining sessions on April 5 and 18. Emboldened by the dismissal of the Union’s unfair labor practice charge in Case 13–CA–209951, Respondent took the position that the parties did not have an agreement on a contract, and sought to reopen discussions on the length of the collective-bargaining agreement, and on whether the agreement should include a union security clause. The Union opposed both of those proposed changes and warned that it would file additional unfair labor practice charges unless Respondent dropped those demands. The Union also felt that its position was strengthened by an April 4, 2018 Administrative Law Judge decision that found Respondent violated the Act by (among other things): discharging/laying off two members of the bargaining unit shortly after the October 2016 election; and removing striking employees’ toolboxes on August 3, 2017. The parties did explore various proposals for bringing the striking employees back to work, but ultimately could not agree on that issue. (Tr. 85–91, 95–96, 99–101, 103, 157, 240–241; see also R. Exh. 3 (pp. 1–2.); *Napleton I*, 2018 WL 1634880 (April 4, 2018) (Goldman, J.), affirmed in part and reversed in part, 367 NLRB No. 6 (2018).

¹⁰ My finding on this point is not undermined by the fact that Hendricks, as indicated in this section, did not respond to Cicinelli’s March 22 email until March 26. The evidentiary record shows that Hendricks was not always prompt in responding to the Union’s emails. See, e.g., Findings of Fact (FOF), Section II(E), *supra* (indicating that in November 2017, Hendricks took a few days to respond to certain telephone and email communications from Cicinelli).

In late April 2018, the Union (through Cicinelli) and Respondent (through attorney Michael MacHarg, on behalf of Hendricks) exchanged the following emails that summarized the parties' perspectives about the dispute:

5 Cicinelli: [April 23] While we wait for things to play out with [the two employees
who were unlawfully laid off/discharged], we do want to get the contract
wrapped up. Our position[] is the same as in November — we have a
contract. Your March 26 email confirms that we have an agreement on
10 the terms of the contract. You then said during negotiations on April 5,
2018 that you were backing up on the term and the dues authorization.
Last week at the April 18, 2018 session, you said based on what
[Respondent's owner] told you, that you would agree to a 5 year
Agreement. So that leaves the dues authorization item. I would like to
15 know if you will agree to what you've already agreed to. If the answer is
yes, we can focus on the strike/replacement issue. That obviously has a
lot of moving parts and will take time to play out, but at least we're then
done with the Agreement. If the answer is no, then we're going to have to
unfortunately file a charge. We made it clear we don't think the "changed
circumstances" argument is going to fly. Please let me know.

20 MacHarg: [April 25] First things first, your position may be that "we have a
contract," but that is NOT the position of my client — and perhaps most
significantly, that is not the view of the NLRB. Accordingly, you need to
come to grips with reality — your heavy handed attempt to force a
25 contract failed and we [must] bargain to accommodation on every single
remaining issue. Then, and only then, will we have a contract.

30 Second, you seem to be confused, there is no issue with respect to dues
authorization, but there is an issue with respect to union security. While I
appreciate your helpfulness that changed circumstances "will not fly," I
am inclined to rely on my own research in order to reach that
determination.

35 Finally, you state that the issue with respect to the strikers has many
moving parts and needs to be resolved. However, the issue resolved itself.
You filed a predictably unsuccessful unfair labor practice charge. The
strikers were permanently replaced. They are now on a preferential re-hire
list. I am not sure anything else needs to be done.

40 Our March 26 correspondence does not acquiesce to your notion of a
contract. I specifically pointed you to the Board's dismissal letter finding
no "meeting of the minds."

45 The bottom line is that you have reached agreement on the economics of a
five year contract, the strikers remain on a list and the contract will not
contain union security. If you are ready to ratify such a contract, we will
execute it.

(R. Exh. 3 (pp. 1–2); see also Tr. 88, 239–240.)

In early May 2018, the parties convened for a conference call to negotiate further about having the striking employees return to work.¹¹ During the call, Cicinelli asked Respondent’s owner Bill Napleton why Respondent would not be interested in having the striking employees, who were highly experienced, return to work. Napleton asserted that the strikers engaged in unacceptable behavior while on the picket line in the form of being rude to customers and replacement workers, but did not identify any specific examples of misconduct. Cicinelli responded that it was human nature that the striking employees would not be “buy[ing] roses” for the workers that replaced them.¹² (Tr. 62–65, 67–69, 96.)

Later in May 2018, the Union put the strike line up again because the striking employees still had not returned to work. At the time of trial, however, the strike line had been taken down. (Tr. 57–58, 121, 143, 158; see also Tr. 121 (noting that at least one of the striking employees did not participate in the May 2018 strike line because he had started working at a new job).)

J. Spring/Summer 2018 – Respondent’s Efforts to Hire Employees in Bargaining Unit Positions

On or about March 23, 2018, Respondent hired employee E.R., with E.R. commencing work as a journeyman on March 26, 2018. (Tr. 195–198, 200–203; GC Exh. 12; see also R. Exh. 10 (E.R.’s employment application, dated March 23, 2018).)

On May 17 and 25, 2018, Respondent’s corporate service manager Tony Renello sent out emails expressing Respondent’s interest in hiring technicians. The emails noted that Respondent was “currently looking for certified GM techs” at its facility, and encouraged the recipients to share the information with any GM certified technician who might be interested. (GC Exh. 14; see also GC Exhs. 12–13 (indicating that Respondent hired at least six employees in bargaining unit positions after March 22, 2018, and indicating that at least four replacement workers hired in August 2017 terminated their employment with Respondent after March 22, 2018).)

In June and July 2018, Respondent began sending letters to the striking employees to offer them the opportunity to resume working for Respondent, albeit at the same rate of pay and benefits that they had when they went on strike (i.e., rates and benefits that were lower than what was set forth in the proposed collective-bargaining agreement). (See GC Exh. 8(a) (example

¹¹ During trial, Respondent objected to any testimony about the May 2018 conference call under Rule 408 of the Federal Rules of Evidence, on the theory that the conference call was a settlement conference. I overruled Respondent’s objection because there was no evidence that the parties were treating the call as a settlement conference covered by Rule 408, as opposed to another bargaining session about how the parties might have the striking employees return to work. (Tr. 63–67.) I stand by that ruling and note that the evidentiary record shows that the parties habitually discussed a variety of issues in their bargaining sessions, including whether they might settle unfair labor practice charges, and whether they might be able to negotiate agreements to end the strike and/or have striking employees return to work.

¹² Cicinelli noted that the police were called on two occasions during the strike, and explained that nothing came out of either of those occasions. There is no evidence that Respondent filed any unfair labor practice charges alleging strike misconduct. (Tr. 68–68, 97.)

letter sent to William Oberg).) Respondent sent offer letters to the following striking employees on the following dates:

	<u>Striking Employee Name</u>	<u>Date of Offer Letter</u>
5	Grant Kelley	June 4, 2018
	Mike Schiro	June 8, 2018
	William Oberg	June 18, 2018
	Chris Becharas	June 30, 2018
10	Mir Iqbal	July 9, 2018
	Joseph Schubkegel	July 9, 2018
	Jeffrey McEntee	July 16, 2018
	John Drucker	July 16, 2018
15	Goron Bogojevic	Specific date not provided ¹³

The striking employees generally advised Respondent to contact the Union regarding Respondent's return to work offers. (Tr. 121-125, 166-169, 177-178; GC Exhs. 8(a)-(b); see also Tr. 12-13.)

20 *K. June 28, 2018 – The Regional Director Revokes the Dismissal of the Union's Unfair Labor Practices Charge in Case 13-CA-209951*

25 On June 28, 2018, the Regional Director notified the Union of his decision to revoke the dismissal of the Union's unfair labor practices charge in Case 13-CA-209951 (the Union's appeal of the dismissal was still pending at the time). The Regional Director stated as follows about the decision:

30 **Revocation of Dismissal:** After further review, I have reconsidered my decision and have now determined that additional proceedings on your charge are warranted. In view of my reconsideration, on behalf of the General Counsel, I am informing you that your charge is being returned to the Regional Office for further processing. Since I have determined that further proceedings are warranted, I am revoking my earlier dismissal of your charge.

35 (R. Exh. 2.) The General Counsel subsequently issued the consolidated complaint in this case (including complaint allegations based on Case 13-CA-209951) on October 31, 2018. (GC Exh. 1(g).)

¹³ Although the record does not specify the date when Respondent sent Bogojevich his return to work letter, the parties stipulated that Respondent sent return to work letters to all nine of the striking employees listed in the complaint. (Tr. 177-178.)

DISCUSSION AND ANALYSIS

A. Credibility Findings

5 A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent).

15 In this case, credibility is generally not at issue because the majority of the testimony that witnesses provided was un rebutted and was corroborated by documentation that was admitted into evidence. The Findings of Fact accordingly incorporate the testimony of all of the witnesses who testified at trial, to the extent that their testimony was relevant, based on their personal knowledge and was corroborated by other evidence (or was un rebutted). To the extent that credibility issues did arise, I have stated my credibility findings in the Findings of Fact above.

B. Do Any Procedural Issues Warrant Dismissing the Complaint?

25 In its posttrial brief, Respondent asserted that I should dismiss the complaint in this case because the complaint allegation that Respondent unlawfully refused to execute the collective-bargaining agreement is not supported by a timely unfair labor practice charge as required by Section 10(b) of the Act, and because the General Counsel should have litigated the complaint allegations at issue here in a single proceeding (i.e., together with the allegations addressed in *Napleton I*).¹⁴ As explained below, I am not persuaded by either of those arguments.

1. The complaint allegations are not time-barred under Section 10(b)

35 Under Section 10(b) of the Act, “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy [of the charge] upon the person against whom such charge is made.” The fundamental policies underlying the 10(b) period are to: bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused; and to stabilize existing bargaining relationships.

¹⁴ Respondent also argues in its posttrial brief that this case should be dismissed because it was improper for the Region to reinstate the charge in Case 13-CA-209951 on June 28, 2018 (after having dismissed it 4 months earlier). As I noted during trial, however, the Region's actions were permissible because the Union appealed the Region's dismissal decision, and that appeal was still pending when the Region decided to reinstate the charge. I am bound to follow the Board's precedent on that point. See *Children's National Medical Center*, 322 NLRB 205, 205 (1996) (explaining that a dismissed charge may be reinstated without violating the 10(b) statute of limitations if the reinstatement occurs while the appeal of the dismissal decision is pending); see also Tr. 13-14, 70-71, 190-191.)

Section 10(b) is an affirmative defense that is waived if it is not timely raised in the respondent's answer or during the trial. *Public Service Co.*, 312 NLRB 459, 461 (1993); *A & L Underground*, 302 NLRB 467, 468 (1991) (citing *Bryan Manufacturing Co. v. NLRB*, 362 US 411, 419 (1960)).

5 As a preliminary matter, I note that Respondent did not assert its 10(b) argument as an affirmative defense in its answer to the complaint or at any point during the trial.¹⁵ Instead, Respondent waited until its posttrial brief to assert its 10(b) defense. Based on well-established Board precedent, I find that Respondent waived its 10(b) defense by failing to raise it in a timely manner. *Public Service Co.*, 312 NLRB at 461 (rejecting the respondent's 10(b) defense as
10 clearly untimely where the respondent raised the defense for the first time in its posttrial brief); see also *EF International Language Schools*, 363 NLRB No. 20, slip op. at 1 fn. 2 (2015), enfd. 673 Fed.Appx. 1 (D.C. Cir. 2017); *Paul Mueller Co.*, 337 NLRB 764, 764-765 (2002).

15 Even if we turn to the merits of Respondent's 10(b) defense, however, the defense still falls short. Respondent predicates its 10(b) defense on the unfair labor practice charge in Case 13-CA-222994 (filed on June 29, 2018), but I find that that charge in Case 13-CA-209951 (filed on November 15, 2017) is the one that is relevant for my analysis. In the charge in Case 13-209951, the Union asserted that Respondent: violated Section 8(a)(3) of the Act by refusing to reinstate employees on November 15, 2017, after an unconditional offer to return to work; and
20 violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union in good faith. (GC Exh. 1(a).)

25 While the charge in Case 13-CA-209951 states the Section 8(a)(5) claim in broad terms (i.e., a failure and refusal to bargain), the record is clear that the Region, Respondent and the Union understood the specific claim to be that Respondent violated the Act by refusing to execute the collective-bargaining agreement that the Union asked Respondent to sign in November 2017. Indeed, Respondent addressed that legal theory in its January 9, 2018 position statement, and the Region addressed the same legal theory when it dismissed the charge on February 23, 2018. (See GC Exh. 9 (pp. 2-3); R. Exh. 1.) Those facts undercut any argument
30 that the complaint allegation regarding Respondent's refusal to execute the collective-bargaining agreement is not supported by a timely unfair labor practices charge.

35 Moreover, it is clear (at a minimum) that the "refusal to execute" complaint allegation is closely related to the unfair labor practices charge in Case 13-CA-209951. The charge in Case 13-CA-209951 explicitly asserts that Respondent violated the Act by not reinstating employees after an unconditional offer to return to work. The legal and factual merits of that claim are intertwined with the question of whether the strike was an unfair practice strike based on Respondent's actions on August 3, 2017 (i.e., the toolbox incident) and/or based on Respondent's refusal to execute the collective-bargaining agreement on November 15, 2017.
40 Accordingly, the complaint allegation that Respondent violated Section 8(a)(5) by refusing to execute the collective-bargaining agreement is closely related to the timely charge in Case 13-CA-209951, and Respondent's 10(b) defense fails.¹⁶ See *Redd-I, Inc.*, 290 NLRB 1115, 1116

¹⁵ Respondent did object to the reinstatement of the charge in Case 13-CA-209951 after the 10(b) period (see fn. 14, *supra*), but that limited argument is distinguishable from a general 10(b) defense that a complaint allegation is not supported by a timely unfair labor practices charge.

¹⁶ Because the "refusal to execute" complaint allegation in this case is closely related to the timely

(1988) (explaining to decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge).

- 5 2. The General Counsel was not obligated to litigate the complaint allegations in this case in an earlier proceeding

10 Next, Respondent contends that, based on the Board's decision in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), the General Counsel is precluded from litigating the allegations in the complaint in this case. Specifically, Respondent argues that a "litigation bar" should apply because the General Counsel was aware of the unfair labor practice allegations in this case in 2017, and should have postponed the January 3-5, 2018 trial in *Napleton I* and litigated all allegations from that case and this one in a single proceeding. (R. Posttrial Br. At 8-11; see also Tr. 191)\

15 In making this argument, Respondent overlooks the fact that the Board has held that *Jefferson Chemical* only applies to cases involving relitigation of the same conduct (e.g., by litigating the same act or conduct as a violation of different sections of the Act, or by relitigating the same unfair labor practice charges in different cases). Where the new allegations are
20 factually independent from the allegations that were litigated in the earlier proceeding, it is permissible for the General Counsel to litigate the new allegations separately, since the separate proceedings will not sacrifice fairness and economy. *Affinity Medical Center*, 364 NLRB No. 68, slip. op. at 2 (2016).

25 I find that it was permissible for the General Counsel to litigate the allegations in this case separately from the allegations addressed in *Napleton I*. In *Napleton I*, the parties litigated whether Respondent violated the Act by:

30 discharging one employee and laying off a second employee in October 2016, shortly after the employees' decision to unionize;

 failing to bargain over the employee layoff in October 2016

35 failing and refusing to provide information in October 2016 related to the employee layoff;

 unlawfully creating the impression in November 2016, that it had employee union activities under surveillance; and

40 unlawfully threatening job loss and ordering the removal of employee toolboxes shortly after employees went on strike in August 2017.

charge filed in Case 13-CA-209951, the decision in *Precision Concrete v. NLRB*, 334 F.3d 88 (D.C. Cir. 2003) (cited by Respondent, see R. Posttrial Br. at 7-8) is distinguishable. See *Precision Concrete*, 334 F.3d at 91-93 (finding that the complaint allegation that the employer told an employee he was being transferred because he wore a union t-shirt was not closely related to a timely underlying unfair labor practice charge).

Napleton I, 367 NLRB No. 6, slip op. at 13-21. Since the allegations in *Napleton I* are factually independent from the allegations at issue here (where the General Counsel alleges that Respondent unlawfully refused to execute the collective-bargaining agreement in November 2017, and unlawfully refused to reinstate the striking employees after they unconditionally offered to return to work in March 2018), there is no basis for a litigation bar based on *Jefferson Chemical*.

C. Is Respondent Obligated to Execute the Contract?

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about November 15, 2017, failing and refusing to execute in writing a complete agreement that it reached with the Union on September 29, 2017, regarding the terms and conditions of employment for the bargaining unit that would be incorporated into an initial collective-bargaining agreement.

It is well settled that the obligation in Section 8(d) of the Act to bargain collectively requires either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations. However, this obligation arises only if the parties had a “meeting of the minds” on all substantive issues and material terms of the agreement. The General Counsel bears the burden of showing not only that the parties had the requisite “meeting of the minds,” but also that the document which the respondent refused to execute accurately reflected that agreement. If it is determined that an agreement was reached, a party’s refusal to execute the agreement is a violation of the Act. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006).

A “meeting of the minds” in contract law is based on the objective terms of the contract rather than on the parties’ subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. When the terms of a contract are ambiguous, and the parties attach different meanings to the ambiguous terms, a “meeting of the minds” is not established. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); see also *Windward Teachers Assn.*, 346 NLRB at 1150.

1. The parties reached a meeting of the minds about contract terms on September 29, 2017, and on November 13, 2017, had a document that accurately reflected their agreement

As established in the evidentiary record, the parties met for contract negotiations on September 29, 2017. Early in that bargaining session, the parties identified the following seven items that were still in dispute regarding the collective-bargaining agreement: (a) the steps that would be required before an employee could be terminated for disciplinary reasons; (b) the pension/retirement (401(k)) plan; (c) health insurance deductibles and copays; (d) whether employee layoffs would be made based on productivity or seniority; (e) wage rates; (f) a union security provision; and (g) the length of the agreement. The Union and Respondent bargained to agreement on each of those issues, leaving only some housekeeping in the form of preparing a wage scale that reflected the parties’ agreement and obtaining contract language from the Union’s attorney about holding Respondent’s contributions to the 401(k) plan in escrow for a 6-month waiting period. The Union addressed the housekeeping issues and sent a written contract

for Respondent to review on November 1, 2017. After an exchange of emails, Respondent notified the Union on November 13, 2017, that the written contract was “good to go.” However, when the Union asserted that the striking employees were entitled to immediate reinstatement, Respondent indicated (on November 15, 2017) that it would not execute the collective-bargaining agreement. (FOF, Section II(D)–(F).)

Based on the evidentiary record, I find that on September 29, 2017, the parties reached a meeting of the minds on all substantive and material terms of the collective-bargaining agreement. I also find that the written collective-bargaining agreement that the Union prepared (on November 1, 2017) and that Respondent approved (on November 13, 2017) accurately reflected the terms of the parties’ September 29 agreement. Neither of those findings is in dispute – indeed, both Hendricks’ trial testimony and Respondent’s position statement (among other evidence) recognize that the parties reached agreement on all provisions of the collective-bargaining agreement, and further recognize that the written collective-bargaining agreement reflected what the parties agreed to. (FOF, Section II(E).) In light of those facts, I find that Respondent was obligated to execute the November 1, 2017 contract that reflected the parties’ September 29, 2017 agreement.

2. The parties’ disagreements about having the striking employees return to work did not relieve Respondent of its obligation to execute the contract

Respondent asserts that it is not obligated to execute the collective-bargaining agreement because the parties did not also have a meeting of the minds about the conditions under which the striking employees could return to work. That argument is unpersuasive. First, as discussed above, the legal standard that applies here establishes that once the parties have a meeting of the minds on all substantive issues and material terms of the *collective-bargaining agreement*, and that agreement is accurately reduced to writing, the parties are obligated to execute the agreement. Those conditions were fulfilled in this case. There is no additional requirement that the parties needed to see eye-to-eye about other issues such as how striking employees may return to work or how pending unfair labor practice charges should be resolved.

In connection with this point, I note that Respondent misses the mark with its reliance on the Board’s decision in *Maintenance Service Corp.*, 275 NLRB 1422 (1985). (See R. Posttrial Br. at 5–6.) In *Maintenance Service Corp.*, the Board found that the employer and union did not have a meeting of the minds on whether the contract they negotiated permitted foremen to perform bargaining unit work, and therefore found that the employer did not violate the Act when it refused to sign the contract. The key to the Board’s decision in *Maintenance Service Corp.* is that the parties there did not have a meeting of the minds about the meaning of the *contract*. See *id.* at 1426–1427. Here, by contrast, the parties were in full agreement on the contract and its terms and meaning – the disagreement about whether the striking employees were entitled to immediate reinstatement was an entirely separate issue.

Second, there is no evidence that the parties agreed to set, as a condition precedent to a contract, a requirement that the parties agree on how the striking employees would return to work. Cf. *Teamsters Local 287 (Granite Rock Co.)*, 347 NLRB 339 (2006), *enfd.* 293 Fed.Appx. 518 (9th Cir. 2008) (noting that parties negotiating a contract may make employee ratification a condition precedent to forming a contract, but only by reaching an express

agreement to that effect). Indeed, when Respondent (on September 29 and November 1, 2017) asked how the Union wanted to handle having striking employees return to work, the Union replied that the parties should put that issue aside and focus on pinning down the terms of the collective-bargaining agreement. The parties proceeded in the manner that the Union proposed (see FOF, Section II(D)–(E)), and once they agreed on contract terms, that agreement was final and binding because no agreed condition precedent(s) stood in the way.¹⁷

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act when, on November 15, 2017, Respondent failed and refused to execute a collective-bargaining agreement that reflected the terms of Respondent’s September 29, 2017 agreement with the Union.

D. Was Respondent Obligated to Immediately Reinstate the Striking Employees Upon Receiving Their March 22, 2018 Unconditional Offers to Return to Work?

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the act by, since about March 26, 2018, failing and refusing to reinstate (or offer to reinstate) nine employees who made unconditional offers to return to work after engaging in a strike that was prolonged by unfair labor practices (specifically, Respondent’s November 15, 2017 refusal to execute the collective-bargaining agreement). The merits of that allegation turn (in part) on whether what admittedly began as an economic strike was later converted to an unfair labor practice strike.

The Board’s standard for determining whether an economic strike has been converted to an unfair labor practice strike is well settled. Relying on both objective and subjective factors, the General Counsel has the burden of showing that the unfair labor practice was a factor in prolonging the strike. Objective factors include evidence of conduct that has a reasonable tendency to prolong a strike, while subjective factors include evidence that the strikers’ subjective motivations for continuing the strike in fact did change as a result of the unfair labor practice. *Gaywood Manufacturing Co.*, 299 NLRB 697, 700 (1990); see also *Ryan Iron Works*, 332 NLRB 506, 507 (2000), enforcement denied in pertinent part on other grounds, 257 F.3d 1 (1st Cir. 2001); *F. L. Thorpe & Co.*, 315 NLRB 147, 149–150 (1994), enforcement denied in part on other grounds, 71 F.3d 282 (8th Cir. 1995).

I find that the General Counsel met its burden of showing that the economic strike converted to an unfair labor practice strike on November 15, 2017, the day that Respondent unlawfully refused to execute the collective-bargaining agreement that the parties negotiated. Respondent’s unlawful refusal certainly had a reasonable tendency to prolong the strike, because the employees went on strike to put economic pressure on Respondent to negotiate a contract, and Respondent’s unlawful refusal to execute the contract logically caused the strikers to resume their strike to protest Respondent’s decision to renege on the deal, and to secure the contract that they (through the Union) negotiated. That conclusion is supported by the subjective evidence

¹⁷ I recognize that the parties used the term “dealbreaker” to refer to their disagreement about having the striking employees return to work. That language, however, falls well short of establishing that the parties had an express agreement to set, as a condition precedent to a contract, a requirement that the parties resolve their differences about how the striking employees would return to work. Indeed, the Union made it clear that the parties’ dispute about the striking employees should not prevent the parties from nailing down the terms of the contract, and that is how the parties proceeded.

presented at trial, which established that the employees took the strike line down after they ratified the contract, and then (understandably) put the strike line up again and began carrying unfair labor practice signs once Respondent refused to sign the contract. See FOF, Section II(F); *Vulcan-Hart Corporation*, 262 NLRB 167, 168 fn. 4 (1982) (observing that since the employees planned to strike until the employer agreed to a contract, Respondent prolonged the strike when it engaged in misconduct that would preclude a contract from ever being reached), *enfd.* in pertinent part, 718 F.2d 269 (8th Cir. 1983).

Since the strike did not convert to an unfair labor practice strike until November 15, 2017, that raises a question about whether and when Respondent permanently replaced any of the striking employees. If Respondent permanently replaced any striking employees on or after November 15, those strikers are entitled to immediate reinstatement and backpay (once they made an unconditional offer to return to work) because they were replaced when they were unfair labor practice strikers. On the other hand, if Respondent permanently replaced any striking employees before November 15 (i.e., at a time when they were economic strikers), then those individuals would only have the preferred reinstatement rights of economic strikers. The Board has indicated that these questions may be resolved in the compliance phase of the case. *Ryan Iron Works*, 332 NLRB at 508; *F. L. Thorpe & Co.*, 315 NLRB at 152; *Gaywood Manufacturing Co.*, 299 NLRB at 701; *Rose Printing Co.*, 289 NLRB 252, 253 (1988).¹⁸

Turning to the facts of this case, the evidentiary record shows that the nine striking employees at issue here made an unconditional offer to return to work on March 22, 2018.¹⁹ Respondent received the unconditional offer to return to work on March 22, 2018, and responded on March 26, 2018, by asserting that the strikers would be placed on a preferential re-hire list (as if they all were economic strikers). Respondent, however, did not follow through with that limited promise, as it: hired multiple new (nonstriker) employees into bargaining unit positions on or after March 22, 2018; did not offer positions to striking employees when replacement workers terminated their employment on or after March 22, 2018; and offered reinstatement to the striking employees on various dates in June and July 2018, but on the improper condition that they accept terms and conditions of employment that were less generous than what the Union and Respondent negotiated for the initial collective-bargaining agreement that Respondent unlawfully failed to execute on November 15, 2017.²⁰ (FOF, Section II(H), (J).)

¹⁸ The evidence presented at trial on whether and when Respondent permanently replaced any of the striking employees was, at best, sparse. (See FOF, Section II(B).) Since the Board has indicated that this issue may be addressed during compliance, however, I take no position on the credibility, weight or merits of any evidence on this issue. Similarly, to the extent that Respondent maintains that there were no suitable openings for economic strikers to fill after they unconditionally offered to return to work, that issue also should be addressed during compliance. (See R. Posttrial Br. at 11 (presenting this argument).)

¹⁹ I am not persuaded by Respondent's argument that the March 22, 2018 offer to return to work was not unconditional. (See R. Posttrial Br. at 11.) Respondent maintains that the Union's offer (on behalf of the striking employees) was predicated on Respondent displacing all replacement workers, but the March 22, 2018 return to work offer does not include any such limitation. (See FOF, Section II(H); see also FOF, Section II(F) (November 14, 2017 return to work offer).) To be sure, the Union and Respondent still disagreed about whether the striking employees were economic or unfair labor practice strikers, but it is a step too far to assert that the striking employees only offered to return to work if Respondent first displaced all replacement workers.

²⁰ To the extent that Respondent passed over any economic strikers when filling relevant vacancies

Based on those facts, I find that Respondent violated Section 8(a)(3) and (1) of the Act by, since March 22, 2018:²¹ not offering immediate reinstatement to any unfair labor practice strikers who made unconditional offers to return to work; and not placing any economic strikers on a preferential hiring list and reinstating them before any other employees were hired or on the departure of their pre-strike-conversion replacements. As noted above, I will leave to compliance the determination of which returning strikers were unfair labor practice strikers.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since October 18, 2016, the Union has been the exclusive collective-bargaining representative of the employees in the bargaining unit.

4. On September 29, 2017, Respondent and the Union reached a complete agreement on the terms and conditions of an initial collective-bargaining agreement.

5. On November 13, 2017, Respondent and the Union agreed that the written contract that the Union presented to Respondent on November 1, 2017, accurately reflected the terms of the agreement that the parties reached on September 29, 2017.

on or after March 22, 2018, I note that Respondent did not proffer any legitimate and substantial business justifications for those decisions. See *Capehorn Industry*, 336 NLRB 364, 365 (2001) (explaining that “an employer will be held to violate Section 8(a)(3) and (1) of the Act if it fails to immediately reinstate [economic strikers] on their unconditional offer to return to work, unless the employer can establish a ‘legitimate and substantial business justification’ for its failure to do so”). As previously indicated, however, Respondent may use the compliance phase of the case to prove, as its business justification for not rehiring economic strikers, that the strikers were permanently replaced. See *id.* (explaining that the permanent replacement of an economic striker is recognized as a legitimate and substantial business justification for refusing to immediately reinstate the former economic striker).

²¹ I emphasize that March 22, 2018, is the precise starting date of Respondent’s obligation to immediately reinstate any unfair labor practice strikers and place any economic strikers on a preferential rehire list. The complaint identifies March 22, 2018, as the date that the striking employees unconditionally offered to return to work, and I have found that the offer was indeed made and received on that day. (See FOF, Section II(H).) To the extent that the General Counsel suggests that Respondent was obligated to begin bringing employees back to work based on the November 14, 2017 offer to return to work (see, e.g., GC Posttrial Br. at 21, 26 fn. 13), I do not accept that argument because it is not alleged in the complaint and was not fully litigated. And, to the extent that Respondent might maintain that its obligations did not begin until March 26, 2018 (based on the complaint allegation that Respondent failed and refused to reinstate striking employees since “about March 26, 2018”), I find that the March 22, 2018 date is established by the evidentiary record and is within the scope of the since “about March 26, 2018” complaint language.

6. By failing and refusing, since November 15, 2017, to execute a collective-bargaining agreement that reflects the terms of the September 29, 2017 agreement between Respondent and the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

7. On November 15, 2017, the economic strike of the following nine striking employees converted to an unfair labor practice strike: Chris Becharas; Goran Bogojevic; John Drucker; Mir Iqbal; Grant Kelley; Jeffrey McEntee; William Oberg; Mike Schiro; and Joseph Schubkegel.

8. On March 22, 2018, the nine striking employees made an unconditional offer to return to work. Respondent received the offer on the same day.

9. By, since receiving the striking employees' unconditional offers to return to work on March 22, 2018, failing and refusing to offer immediate reinstatement to any unfair labor practice strikers, and/or failing and refusing to place any economic strikers on a preferential hiring list and reinstate them before any other employees were hired or on the departure of their pre-strike-conversion replacements, Respondent violated Section 8(a)(3) and (1) of the Act.

10. The unfair labor practices stated in conclusions of law 6 and 9, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute a collective-bargaining agreement reflecting the September 29, 2017 agreement that it reached with the Union, I shall order Respondent to execute and implement the agreement and give retroactive effect to its terms. I shall also order Respondent to make bargaining unit employees whole for any losses attributable to Respondent's failure to execute the agreement, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Regarding Respondent's violation of Section 8(a)(3) and (1) of the Act through its actions after the striking employees made their March 22, 2018 unconditional offers to return to work, I shall require Respondent to take the steps set forth in this paragraph. Concerning any former unfair labor practice strikers who were not offered immediate reinstatement, I shall require Respondent, if it has not already done so, to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after November 15, 2017. If, after such dismissals, there are insufficient positions available for the remaining former unfair labor practice strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice used by Respondent. The remaining former unfair labor practice strikers, as well as those former strikers who were permanently replaced before the strike

converted to an unfair labor practice strike, for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with seniority or other nondiscriminatory practice used by Respondent, and they shall be reinstated before any other persons are hired or on the departure of their pre-strike-conversion replacements. See *Ryan Iron Works*, 332 NLRB at 509; *Gaywood Manufacturing Co.*, 299 NLRB at 701-702. Former unfair labor practice strikers who were denied immediate reinstatement in response to their unconditional offer to return to work shall also be made whole for any loss of earnings they may have suffered. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

To the extent that the compliance phase of this case establishes that one or more of the striking employees was an economic striker (i.e., a former striker who was permanently replaced before the strike converted to an unfair labor practice strike) and was not recalled on or after March 22, 2018, by Respondent to fill a vacant position to which they were entitled based on the preferential hiring list, I shall require Respondent to immediately recall them to the position they occupied at the time they went on strike, or to a substantially equivalent position, with full seniority and all other rights and privileges. I shall also require Respondent to make any such employees whole for the discrimination against them by paying the sum of money equal to what each would have earned from the date that each should have been recalled until the date each is recalled. See *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1149 (1994), enfd. 72 F.3d 780 (10th Cir. 1995). This make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate any former unfair labor practice strikers, as well as any economic strikers who unlawfully were not recalled to work in a timely manner, for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 13 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

ORDER

Respondent, Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville, Libertyville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute a collective-bargaining agreement that reflects the agreement that Respondent and the Union reached on September 29, 2017, regarding the terms and conditions of an initial collective-bargaining agreement.

(b) Failing and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work and/or failing and refusing to recall economic strikers, following their unconditional offers to return to work, to positions they occupied at the time they went on strike or to substantially equivalent positions when a vacancy occurs. (The strikers are: Chris Becharas; Goran Bogojevic; John Drucker; Mir Iqbal; Grant Kelley; Jeffrey McEntee; William Oberg; Mike Schiro; and Joseph Schubkegel.)

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request of the Union, forthwith execute the collective-bargaining agreement that the Union submitted to Respondent for signature on or about November 1, 2017, and give retroactive effect to the terms of that agreement to September 29, 2017 (the effective date of the agreement).

(b) Make bargaining unit employees whole for any losses they have suffered as a result of Respondent's failure to sign and effectuate the agreement, plus daily compound interest, as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, offer those former unfair labor practice strikers who Respondent has not yet reinstated since their March 22, 2018 unconditional offer to return to work full and immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after November 15, 2017.

(d) Make whole all unfair labor practice strikers who were not permanently replaced before November 15, 2017, to whom Respondent failed to offer reinstatement upon their March 22, 2018 unconditional offer to return to work, for any loss of earnings they may have suffered, plus daily compound interest, as set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, offer immediate recall to all former economic strikers who Respondent did not recall after their March 22, 2018 unconditional offer

by the Board and all objections to them shall be deemed waived for all purposes.

to return to work to fill a vacant position to which they were entitled based on the preferential hiring list. For any such employees, Respondent shall immediately recall them to the position they occupied at the time they went on strike, or to a substantially equivalent position, with full seniority and all other rights and privileges.

(f) Make whole all economic strikers who unlawfully were not recalled in a timely fashion after their March 22, 2018 unconditional offer to return to work, for any loss of earnings they may have suffered, plus daily compound interest, as set forth in the remedy section of this decision.

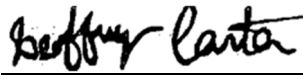
(g) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facilities in Libertyville, Illinois, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 24, 2019.


 GEOFFREY CARTER
 Administrative Law Judge

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute a collective-bargaining agreement that reflects the agreement that we and the Union reached on September 29, 2017, regarding the terms and conditions of an initial collective-bargaining agreement.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers upon their unconditional offers to return to work and/or fail and refuse to recall economic strikers, following their unconditional offers to return to work, to positions they occupied at the time they went on strike or to substantially equivalent positions when a vacancy occurs. (The strikers are: Chris Becharas; Goran Bogojevic; John Drucker; Mir Iqbal; Grant Kelley; Jeffrey McEntee; William Oberg; Mike Schiro; and Joseph Schubkegel.)

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, forthwith execute the collective-bargaining agreement that the Union submitted to us for signature on or about November 1, 2017, and give retroactive effect to the terms of that agreement to September 29, 2017 (the effective date of the agreement).

WE WILL make bargaining unit employees whole for any losses they have suffered as a result of our failure to sign and effectuate the collective-bargaining agreement, plus interest compounded daily.

WE WILL offer those former unfair labor practice strikers who we have not yet reinstated since their March 22, 2018 unconditional offer to return to work full and immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL discharge, if necessary, any replacements hired on or after November 15, 2017.

WE WILL make whole all unfair labor practice strikers who were not permanently replaced before November 15, 2017, to whom we failed to offer reinstatement upon their March 22, 2018 unconditional offer to return to work, for any loss of earnings they may have suffered, plus daily compound interest.

WE WILL offer immediate recall to all former economic strikers who we did not recall after their March 22, 2018 unconditional offer to return to work to fill a vacant position to which they were entitled based on the preferential hiring list. For any such employees, WE WILL immediately recall them to the position they occupied at the time they went on strike, or to a substantially equivalent position, with full seniority and all other rights and privileges.

WE WILL make whole all economic strikers who unlawfully were not recalled in a timely fashion after their March 22, 2018 unconditional offer to return to work, for any loss of earnings they may have suffered, plus daily compound interest.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

NAPLETON 1050, INC. D/B/A NAPLETON
CADILLAC OF LIBERTYVILLE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

Dirksen Federal Building, 219 South Dearborn Street, Room 808, Chicago, IL 60604-1443
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/13-CA-209951 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER (312) 353-7170.